Supreme Court, U. S.
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No. 77-1707

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

ROBERT STARR, et al., Petitioners,

v.

RICHARD NIXON, et al., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CARL R. NUTZHORN
704 East Hopkins Street
Aspen, Colorado 81611
Counsel for Petitioners

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OPINION BELOW

The opinion of the District Court for Colorado here sought to be reviewed before judgment in the Court of Appeals is not published and appears in the Appendix hereto.

JURISDICTION

This action was docketed in the Tenth Circuit Court of Appeals on May 22, 1978 and this petition was timely filed by mail on May 27, 1978. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1), 2101(e), and U.S. Sup. Ct. Rule 20.

QUESTIONS PRESENTED

1. Whether the pardon granted former President Nixon by his successor upon resignation after a vote of articles of impeachment against him by a subcommittee of the House Judiciary Committee is void as in violation of U.S. Const. Art. II. Sec. 2. Cl. 1, providing that the President "...shall have power to grant reprieves and pardons for offenses against the United States except in cases of impeachment."

2. Whether these plaintiffs have standing to sue to raise this question.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Art. II. Sec. 2. Cl. 1
U.S. Const., Amendment V.
U.S. Const., Amendment X.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. 1331, 2201, 2202.

STATEMENT OF THE CASE

President Richard Nixon, confronted with certain impeachment upon a unanimous vote of articles of impeachment against him by a Subcommittee of the House Judiciary Committee, resigned his office on August 9, 1974. His successor, former Vice-President

Ford, on August 30, 1974 requested his special counsel Philip Buchen "to study traditional precedents bearing on the exercise of his right to grant a pardon, particularly with reference to whether or not a pardon could only follow indictment or conviction." Only Buchen and possibly one law associate considered the question (the Department of Justice Pardon Attorney did not), and concluded the absence of indictment was no bar, in reliance on Ex parte Garland 4 Wall 333 (1867) and Burdick v. United States 236 U.S. 79 (1915). That law research, plus the reaching of an agreement with both Nixon and the General Services Administration about custody of Nixon's papers and tapes, was accomplished in secret in eight days, with the pardon granted on September 8, 1974. (Record, 101, Exhibit 4 to Plaintiffs' Opposition to Motion to Dismiss).

The question of substance now presented to this Court apparently never was considered by Special Prosecutor Leon Jaworski (See Jaworski, "The Right and The Power" Gulf Pub. Co., Houston 1976, Cprs. 14 and 15) nor by Professor Philip B. Kurland in his scholarly "Watergate and the Constitution" Univ. Chicago Press 1978, Cpr. 7,

although other possible grounds of challenge were suggested, considered, and rejected. Apparently, to the extent it has been deliberately considered at all in the Watergate-scandal-induced national numbness, this question has been assumed disposed of by reading the Constitutional limitation to mean only that a Presidential pardon "shall not be pleadable in bar of impeachment" although study discloses that exactly the latter language was rejected by the framers for the present wording of Art. II. Sec. 2. Cl. 1. (See Journal, Convention, 1787 p. 295; Farrand, Records, II, 419 as cited by W.H. Humbert, "The Pardoning Power of the President" American Council on Foreign Affairs, Wash., D.C. 1941 as set out at Record, 101 sub. 269). Other factors indicating the present language must forbid pardons for criminal offenses (even though technically there need by none) giving rise to "cases of impeachment" are, (a) American impeachments, as distinguished from English ones, are civil proceedings for removal from office only, thus leaving no place for pardon for a criminal offense, (b) The plain legal meaning of "a case", from time immemorial has been that the occurrence of acts constituting the offense has been authoritatively established, whether the offender is

convicted, indicted, or even identified, and (c) The last result in the world the founders could have intended is just what we now have; a President that cannot be indicted during his term of office who is subject only to impeachment but then assured a pardon from his hand-picked running-mate Vice-President under U.S. Const., Amend. XII. election procedure - a compounding of the evil unforseeable by the founders.

Plaintiffs' standing to sue to raise this issue has several particularized bases, and two that are novel as far as known to counsel.

As voters, plaintiffs Starr and Ward maintain that impeachment is peculiarly a remedy belonging to them through their elected representatives, that the Constitutional exclusion of pardon "in cases of impeachment" is a necessary and intrinsic part of the impeachment deterrent to Presidential misconduct, and that federal Courts have long zealously protected federal votes from debasement. See Smiley v. Holm 285 U.S. 355 (1931) where a single voter in Minnesota had standing to enforce the U.S. Constitutional requirement that representatives be elected at large (in default of procedurally correct State redistricting) when the 1930 census population loss reduced by one the Minesota Congressional delegation, absent any statutory

standing from the Civil Rights Acts, and see also Leser v. Garnett 258 U.S. 130 (1922).

As taxpayers and independent businessmen, plaintiffs Starr and Ward claim a right to liberty and equal protection under U.S. Const., Amend. V. from discriminatory treatment, by the U.S. Internal Revenue Service and other federal regulatory agencies at the direction of a Presidential office made "above the law", for their political opposition to an incumbent of that office. These claims seek relief from illegal acts, as distinguished from any mere "chilling effect" of essentially legal acts of surveillance as were upheld in Laird v. Tatum 408 U.S. 1 (1972).

As a minor born January 31, 1976, Casey James Ward claims standing to sue for relief in this action under the federal common law remedies provided when there is no other appropriate source as found in Bell v. Hood 327 U.S. 678 (1946) and Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics 403 U.S. 388 (1971).

Each of the above standing claims is made deliberately and particularly by less than all members of the broad category of persons within the generally accepted meaning of such classes as "voters" and "taxpayers" rejected in Schlesinger v. Reservists Committee

to Stop the War 417 U.S. 208 (1974) and United States v. Richardson 418 U.S. ~~1966~~ 166 (1974). Carrying still further the diminution of the group and consequent increase of the individual plaintiffs' burden, plaintiffs Starr and John Doe A, B and C claim standing as persons who bear the burden, by virtue of their capacity to do so, of exercising the U.S.Const. Amend. X. right of rebellion reserved to them from the Declaration of Independence - by assassination if need be. They also claim standing under U.S. Const. Amend. X. on the ground that the pardon power purported to be exercised by Ford on behalf of Nixon was never delegated to the United States Executive branch by the people who ratified the Constitution.

Lastly, to the extent that Flast v. Cohen 392 U.S. 83 (1968) may be regarded as sui generis because of the importance of the Establishment clause to the founders and ourselves regarding the nature of our society, all these plaintiffs maintain that the essence of liberty secured under U.S. Const. Amend. V. consists of living in a republic where the chief executive is as/nearly equally subject to the criminal law as may be, and certainly not where he is in effect a King who is above the criminal law.

The issue whether to grant a Writ of Certiorari is distinguishable from whether to exercise discretion to grant a declaratory judgment; the pardon precedent here challenged can be alternately reversed by an indictment forcing a pleading of the pardon as a defense, or conceivably by Constitutional amendment. Should any member of this Court agree with petitioners about the importance of this pardon question and still not find standing, plaintiffs submit that grant of the Writ for some discussion of the merits seems wisely within this Court's responsibilities. Plaintiffs' Opposition to Motion to Dismiss (Record, 31-44, with 75 pages of Appendices plus its Exhibit 4 "Pardon of Richard M. Nixon, and Related Matters" U.S. House Judiciary Committee Subcommittee on Criminal Justice, 93rd Cong. 2nd. Sess. (1974) was prepared for this Court's examination of a concise statement of Petitioners' entire case on the merits and on standing, urging that this question is one of lineage and weight comparable to that addressed by this Court in Flast v. Cohen 393 U.S. 83 (1968).

As to relief, petitioners don't argue there can be no clemency for a man in Nixon's position; only that it must come from a federal judge or via a quasi plea-bargain with Congress, see Record 38, lines 2-5 and Fn. 14.

REASONS FOR GRANTING THE WRIT

1. This is an important Constitutional issue which must be resolved by this Court if at all; the arguments in the District Court will not be significantly enhanced by repetition in the Tenth Circuit Court of Appeals; and since the federal criminal statutes of limitation are five years the hazard that the question may become mooted before a final ruling by this Court is best met by granting the Writ now.

2. The pardon precedent here challenged can be variously regarded as, (a) A breach in the functional integrity of our limited government so severe as to assure its otherwise untimely collapse, (b) A subtle Presidential-consciousness-altering reality making criminal activites an unduly trivial matter, to the inevitable detriment of the day-to-day conduct of that office, (c) A taproot of cynicism about the aspirations and integrity of our institutions, drawing withdrawal and indifference into the mind of the citizenry, and (d) As being like a chamber pot overturned on top of the flagpole over the U.S. Capitol dome: some literally can't see it; others who can, insist it isn't really there, or if it is, it is small, far off, and most people seem to have become resigned to it.

Petitioners submit that this Court, in upholding the Constitution of the United States, and in maintaining its own role as the guardian of that Constitution, should grant this Petition.

CONCLUSION

For all the above reasons, a Writ of Certiorari should issue to review the opinion and judgment of the District Court for Colorado before judgment in the Tenth Circuit Court of Appeals.

Respectfully submitted,

Carl R. Nutzhorn

CARL R. NUTZHORN
704 East Hopkins Street
Aspen, Colorado 81611
Counsel for Petitioners

May 27, 1978

APPENDIX A.

Opinion and Judgment Below

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO
Civil Action No. 77-F-1078

ROBERT STARR, et al., Plaintiffs, v. RICHARD NIXON, et al., Defendants.) ORDER GRANTING MOTION TO DISMISS

THIS MATTER is before the Court on the Motion to Dismiss filed by defendants on February 21, 1976. Also outstanding is a Request for Entry of Default filed April 6, 1978 as to defendants Richard Nixon and Gerald Ford in their individual capacities. Upon consideration of the motions and extensive briefs of the parties, we find: 1) the motion to dismiss should be granted for lack of jurisdiction and lack of standing of the parties to sue; 2) the request for entry of default is therefore moot.

I.

Plaintiffs are "citizens, voters, and taxpayers" of the United States, with the exception of Casey James Ward, a minor. Casey Ward's interests are being represented by his father and guardian, James Ward. Plaintiffs seek a declaratory judgment holding the pardon of former President Richard Nixon by President Gerald Ford to be null and void as violative of Article II, Section 2 of the United States Constitution. Plaintiffs also seek other related relief.

II.

Defendants, in their motion to dismiss and supporting briefs, raise several grounds as a basis for dismissing this suit, including lack of jurisdiction of this court and lack of standing of plaintiffs to bring the action.

At the outset, we note similar challenges have been brought in other federal district courts. In Murphy v. Ford Civil Action No. M-74-141 (W.D. Mich., March 28, 1975), Plaintiffs sought a declaratory judgment that the pardon of Richard Nixon was null and void. The plaintiffs' arguments were two-fold: 1) The pardon could not be validly granted to a person who had never been indicted or convicted; 2) the pardon created unequal enforcement of the laws. In its decision dismissing the suit the court emphasized the discretionary nature of the Presidential pardon. It found that the validity of the pardon was not affected by the

fact Mr. Nixon was never indicted or convicted of an offense. Further, the Court noted that the pardon does not erase the fact of wrongdoing or moral stigma attaching thereto. In Koffler v. Ford, Civil Action No. 74-1706 (D.D.C., Sept 25, 1974), the court, sua sponte dismissed a suit seeking to "negate" the pardon of Mr. Nixon. The basis of the court's holding was that the plaintiff, as a taxpayer, attorney, and legal educator had no special standing distinct from any other citizen. Accordingly, the court did not have jurisdiction to review the complaint.

We chose to dismiss this action on two alternative grounds. First, judicial policy dictates in favor of avoiding a confrontation between the judicial and executive branches of the government. Reese v. Nixon 347 F. Supp. 314 (C.D. Cal. 1972); San Francisco Redevelopment Agency v. Nixon, 329 F. Supp. 672 (N.D. Cal. 1971). Cf. Dole v. Carter, ___ F.2d ___, Civil Action No. 77-2117 (10th Cir., Dec. 31, 1977). In defining the roles of the three branches of government in our criminal justice system, the Supreme Court stated in Ex parte United States, 242 U.S. 27, 41-42 (1916):

> Indisputably under our constitutional system the right to try offenses against the criminal laws and upon conviction to impose the punishment provided by law is judicial... . . (I)ndisputable also is that the authority to define and fix the punishment for crime is legislative...and that the right to relieve from the punishment, fixed by law and ascertained according to the methods by it provided, belongs to the executive department.

A Presidential pardon reaches the punishment prescribed for the offense and the guilt of the offender. Murphy v. Ford, supra. The exercise by the President of his pardon power, pursuant to Article II, Section 2 of the Constitution, is one of virtually unlimited discretion. Only the impeachment exception explicitly limits the exercise of the pardon power. In this way, Congress has an ultimate authority over the conduct of all executive officers, including the President. Upon consideration of the above principles, we find the issues presented in this action are ones over which this court should decline to exercise jurisdiction.

Second, we find the plaintiffs do not have standing to raise the issue presented in their complaint. In this regard, we accept the logic of the Koffler case, supra, as persuasive here. See also United States

Richardson, 418 U.S. 166 (1974); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, (1974).

In reaching the above determination, the Court has not considered matters outside the pleadings, thereby maintaining the integrity of the motion to dismiss.

ORDER

Defendants' Motion to Dismiss filed February 21, 1978 is GRANTED for lack of jurisdiction of this court. The complaint and cause of action are DISMISSED. The request for entry of default is moot.

DATED at Denver, Colorado, this 13th day of April, 1978.

BY THE COURT:
/s/ Sherman G. Finesilver

SHERMAN G. FINESILVER, JUDGE
United States District Court

APPENDIX B.

Errata Sheet of typographical corrections in Plaintiffs' Opposition to Motion to Dismiss, (Record pages 31-44)

Record page	Line	
2	24	"parliamentary..."
4	12	"Appendix 4 that..."
7	18	"as a Professor of law..."
9	1	"and U.S. v. Richardson 418 U.S. 166..."
12	6	"reach acts of federal officials16.5", and at bottom of this page footnote 16 becomes 16.5

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners brought suit in the United States District Court for the District of Colorado, seeking a declaratory judgment that the pardon of former President Nixon by President Ford violated Article II, Section 2 of the Constitution.[1] The district court dismissed the complaint for lack of jurisdiction and for lack of standing of petitioners (Pet. App. A). Petitioners filed a timely notice of appeal to the United States Court of Appeals for the Tenth Circuit, and that court docketed the appeal on May 22, 1978. This petition was filed on May 30, 1978, seeking a writ of certiorari in advance of judgment.

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[1]"The President * * * shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."

This case is not of "such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement" in this Court, and thus certiorari before judgment is not warranted under Rule 20 of this Court's rules. See *United States* v. *Nixon*, 418 U.S. 683, 686-687; *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579; *United States* v. *United Mine Workers of America*, 330 U.S. 258; *Carter* v. *Carter Coal Co.*, 298 U.S. 238.

Moreover, petitioners' claims are insubstantial. Petitioners, who identify themselves as voters, taxpayers, and independent businessmen (Pet. 5-6), lack standing to sue because they have alleged no personal injury, let alone an injury distinct from that of any other citizen. *United States* v. *Richardson*, 418 U.S. 166; *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208; *Linda R.S.* v. *Richard D.*, 410 U.S. 614. Moreover, the President's power to issue pardons is textually committed to his judgment alone, and judicial supervision of the exercise of that power would be inappropriate. *Schick* v. *Reed*, 419 U.S. 256.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JULY 1978.

DOJ-1978-07